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***THE COMPANY ESTABLISHMENT BASED ON
MUSHARAKAH AGREEMENT WHICH HOLD ON JUSTICE
PRINCIPLE***

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ABSTRACT:

This research has the goal (1) identify, analyze and explain the form of the principle of fairness based on Musharakah contract in the agreement forming the company. (2) Identify, analyze and explain the laws that exist in Indonesia to accommodate the Musharakah contract in the agreement forming the company containing the principle of fairness to the parties in it. (3) Identify, analyze and develop the concept of the future treaty forming the company containing the principle of justice based contract Musharakah. This research is a normative law (*legal normative research*) is often referred to doctrinal research, namely: an object of research is to study the legislation documents and library materials. This research is paradigmatic hermeneutics, using an approach of philosophy of law (*legal philosophy approach*), regulatory approaches, and conceptual approaches. The final results of the study indicate that there is fairness in the distribution of gains and losses, as well as the proportion of capital that included the parties. Musharaka contract itself has been accommodated within the laws of economics and business in Indonesia, the rule of the most high to the lowest.

Keywords: The Principle of fairness, Musharakah, a company.

INTRODUCTION

The concept of Musharakah agreement is a cooperation which can be conducted between two capital owners in order to build business

cooperation in which they have different amount of capital. Each side participates in the company, and the division of their advantage and their disadvantage will be in the same proportion or based on their capital proportion.¹ Musharakah in Indonesia that is identified clearly by civil alliance can be found in Article 1619 of Civil Law Code (which will be shortened and written as KUHP Civil in the further explanation). It stated:²

” Alliance is an agreement which two or more people bind themselves to take a part in the alliance, in order to share profit of the agreement result.”

Indirectly, the alliance regulation in KUHP Civil also contains of universal Islamic value, which is in the next Article, that is Article 1619 BW, stated that:

*”All kinds of Alliances must conduct legitimate business, and it must be made in order to give advantages for all its members. Each Ally must invest their money, other things or even their enterprises into the company.”*³

In Indonesia, the activity of civil alliance is based of investigation activity, it gives positive side and negative side to its existence. One of positive side of the infestation existence in Indonesia is that it uses many employees, which eventually it can decrease the life degree of society. Besides, the infestation that gives positive side, some infestations gives bad influences. These negative influences were ended by the conflict between the investor and the management. Even more, it emerges conflict with surround society. Furthermore, based on the researchers. This conflict is started by the unclear basic contract of the agreement which becomes the foundation of that infestation.

¹Article 136 *Kompilasi Hukum Ekonomi Syari'ah*. (Jakarta: Mahkamah Agung Republik Indonesia, 2008), h. 43.

²Subekti & Tjitrosudibio. *Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek)*. (Jakarta: Pradnya Paramita, 1996), h. 426

³*Ibid*

This situation demands a solution or new innovation in the infestation world by conducting an agreement which based on Musharakah agreement as the basic that emerges justice and benefit for the whole related sides.

Some studying focuses that will be conducted by the researchers as problem formulation are:

1. What is the form of justice principle in an agreement which based on Musharakah agreement in company establishment?
2. How can the law in Indonesia accommodate Musharakah agreement in the agreement of company establishment?
3. What is the further concept of an agreement which based on Musharakah agreement?

This research is supported by the theories of Majid Khadurri that explained the substantive justice, such as the justice elements in substation of Islamic Law (substantive justice). The second theory is from Syamsul Anwar related to legislation hierarchy in Islamic Law, which contains of abstract law realized in middle norm, and the middle norm is realized in the form of concrete legal regulation.

The aims of this research are: 1. to find, to analyze and to explain the form of justice principle in the agreement of company establishment based on Musharakah agreement. 2. To find, to analyze and explain the law in Indonesia in accommodating the Musharakah agreement in an agreement of company establishment which holds on justice principle for the members of the agreement. 3. To find, to analyze and improve the further concept of company establishment agreement which holds on justice principle.

LITERATURE REVIEW :

Agreement Al-Qur'an explains, at least there are two kinds of terms related to an agreement, the word '*agreement*' (*Al-'Aqdu*) and the word '*ahd*' (*Al -Ahdu*). The first word '*agreement*' (*akad*)

etymologically means contract, bond or Musharakah (*Al-Ittifaq*). Al-Qur'an uses this term in an agreement and bond. The second word, (Al-Ahdu), etymologically means time, message, completing and commitment or agreement. However, the term that is used in mu'amalah (business transaction) is 'akad' (Al-Aqdu).⁴

Based on the Islamic Law Expert, agreement (akad) means:

“Connection between ijab (an offer) and Qabul as the willing of Syari’at (Islamic Law) which confirms the existence of the law effect (result) to the object of the agreement.”

Concerning the formulation of Islamic Law experts about akad (agreement), Tahir Azhary in Gemala Dewi stated explanation that the Islamic Agreement Law is the series of lawa rules which come from Al-Quran, As-Sunnah (Al-Hadits), and Ar-Ra’yu (Ijtihad). It regulates the relation of two or more people on the object legality in being the object of transaction.⁵ Moreover, it is also explained that the law principles related directly with the concept of Islamic agreement law come from Al-Quran and hadits of the prophet of Muhammad, SAW (As-Sunnah), and fiqh principles function as syari’ah understanding which is done by human being (Some Mazhab Moslem theologians) in which is a form of Ijtihad.

Agreeing above statement, there are more definitions which relate to akad (agreement), those are:

1. According to Syamsul Anwar, akad (agreement) is the meeting of ijab (offer) and qabul (agree) as the agreement statement of both sides in order to create law effect to its object.⁶

⁴ Faturrahman Djamil in Mariam Darus Badruzaman. *Compilation of Engagement Law: Shari’ah Law Treaty*. (Bandung : Citra Aditya Bakti, 2001), h.247.

⁵ Gemala Dewi, Et All. *Islamic Law Treaty in Indonesia*. (Jakarta :Prenada Media, 2005), h. 3

⁶ Syamsul Anwar. *Hukum Perjanjian Syari’ah: Studi tentang Teori Akad dalam Fikih Muamalat*. (Jakarta: RajaGrafindo Persada, 2007), h. 68

2. Based on Article 262 Mursyid Al-Hairan, akad (agreement) is the meeting between ijab (offer) that is purposed by one of the sides, and Qabul (agree) that is from the other side in which eventually it creates law effect to the object of akad (agreement).⁷

Both definitions show that:⁸

1. Akad (agreement) is the relationship or the meeting between Ijab (offer) and qabul (Agree) which emerges the law effect.
2. Akad (agreement) is the law action from the both sides, it is because akad (agreement) is the agreement form that represents the the willing of one side and qabul (agree) representing the willing of the other side.
3. The aim of akad (agreement) is to create law effect. Moreover, the aim of akad (agreement) is the goal of the both sides and the goal that is going to be reached by its participants by making an agreement (akad).

Contemporary Islamic Law uses the term of “iltizam” in order to describe the bond (*Verbintenis*) and the term of akad (agreement) is used to clarify the agreement (*overeenkomst*), even in order to describe the contract.⁹ Relating to the formulation of Islamic law expert, Tahir Azhary in Gemala Dewi explained that the law of Islamic agreement is the series of law principles that come from Al-Quran, As-Sunah (Al-Hadits), and Ar-Ra’yu (Ijtihad). It regulates the relationship of two or more people in their relation to the object that will be legalized to be as transaction object.¹⁰ Furthermore, it is also explained that the law principles that directly relates to the concept of Islamic

⁷ Basya. *Mursyid al-Hairan ila Ma’rifah Ahwal Al-Insan*. (Kairo: Dar al-Furjani, 1403/1983), h. 49

⁸ Syamsul Anwar. *Op.Cit.* h. 68-69

⁹ *Ibid*, h. 47 he explained furthermore that the term of agreement is the old term that has been used since classic period, thus it is highly standard. While the term of iltizam is the new term in order to name the general agreement, although that term itself has been quite old.

¹⁰ Gemala Dewi, Et All. *Op.Cit.* h. 3

Agreement Law is from Al-Quran and Hadits of the Prophet of Muhammad, SAW (As-Sunnah), and the principles of fiqh function as the understanding of syari'ah which is done by human being (Some Mazhab Moslem theologians). It is also as the form of Ijtihad. Based on this condition, it is clear the law of Islamic Agreement does not merely regulate the human being relationship, but it also regulates relationship between human and God (Allah SWT) and regulates the relationship between human and their environment.

Musharakah Based on the complication of syari'ah banking law that was stated by Supreme Court of Republic Indonesia, syari'ah concept is the cooperation that can be done between two or more capital's owners that do the business together using different amount of capital. Each side participates in the company, its profit and its loss are distributed in the same part or based on the basic of capital portion.¹¹Musharakah or syirkah can be defined as collaboration form where two or more people gather capital and effort together, in order to share the same profit, enjoy the similar right and responsibility.¹²

Concept of Law Institution for Building Company:

Law Institution is the legal term of Dutch term“rechtspersoon”, where the regular ordinance that regulates the terms completely does not exist in KUHPCivil Indonesia.J.J. Dormeier in Chidir Ali stated that the terms of law institution can be explained as below:

1. The alliance of people who are the law association act just as an individual;
2. Charity foundation, some wealth or assets that are used for specific aim; it means that this charity foundation is used as a personal purpose.

Law institution has an authority, the law ability in doing some legal actions. It means that the law institution is human who acts as legal

¹¹See article 136 *Kompilasi Hukum Ekonomi Syariah*, year 2008, h. 43

¹²Saad Abdul Satar Al-Haran. *Op.Cit.*,74

subject, they can conduct the legal action. However, the legal action that can be done by law institution is very limited where the law institution does not have an authority in the field of family law.

Justice According to Majid Khadduri, literally the word ‘*adl* is abstract noun, which is from verb, means:¹³

1. Straighten or sit straightly, amendment or modify;
2. Run away, depart or avoid the wrong way and go to the right way;
3. Similar or equal or equalize;
4. To balance, equal or being in balance state (state of equilibrium).

Murtadha Muthahhari, stated the justice concept that is known in four things:¹⁴

1. Fair, it means balance. When society wants to survive and stay alive in stable situation, thus that society has to be in balance state, where everything inside this society stays in proper portion not in similar portion.
2. Fair, it means the equality in understanding everything. Justice in this explanation means to preserve similarity when it has similar rights. It is because justice conditions this balance.
3. Fair means maintaining the individual right and give that right to each person that deserves to get it. This justice is a social justice that has to be respected in human law and every individual is ordered to obey and conduct this principle.
4. Fair means is preserving the right of existence.

¹³Madjid Khadduri. *The Islamic Conception Of Justice* terjemahan H.Mochtar Zoeni. *Teologi Keadilan Perspektif Islam*.(Surabaya: Risalah Gusti, 1999), h. 8-9

¹⁴Muthahhari, Murthada. *Keadilan Ilahi:Azaz Pandangan Dunia Islam*. (Bandung: Mizan. 1995), h.53-58

The ideas of justice above improves into the whole world and it gives more creations to the thought of experts around the world. One of famous thought belongs to Aristoteles in Raymond Wacks, as explained in his big work “*Nichomachean Ethics*”, which means doing kindness or in other words, justice is the main kindness.¹⁵ Furthermore, Aristoteles stated that “*justice consists in treating equals equally and unequals unequally, in proportion to their inequality.*” Agreed with Aristoteles, Ulpianus in O.Notoamidjojo described justice as “*justitia es constans et perpetua voluntas ius suum cuique tribuendi*”.¹⁶ Based on that, K. Bertens stated that “*to give everybody his own*”.¹⁷

RESEARCH METHOD:

This research is normative legal research. Normative legal research was used to analyze justice principle in agreement based on Musharakah agreement in the company establishment. Moreover, in order to understand law phenomenon and legal issue that would be analyzed in this research, other approaches were used as supportive approach and complement approach.

Other approach that is relevant to be used as the complement as an effort in understanding and explaining completely the law phenomenon and the legal issue analyzed and investigated in this research is the idea of S. Soekanto & Sri Mamudji. He stated that normative legal research contains:¹⁸

- a. *Legal philosophy approach*, by its philosophy which covers the whole thing, basic and speculative, thus this approach will investigate the legal issue in this legal research radically and this

¹⁵Raymond Wack. *Jurisprudence*. (London: Blackstone Press Limited. 1995), h. 178

¹⁶O Notoamidjojo. *Masalah Keadilan*. (Semarang: Tirta Amerta. 1971.), h. 18-19

¹⁷K. Bertens. *Pengantar Etika Bisnis*. (Yogyakarta: Tanpa Penerbit, 2000), h.86

¹⁸S. Soekanto & Sri Mamudji. *Penelitian Hukum Normatif; Suatu Tinjauan Singkat*, (Jakarta:PT. Raja Grafindo Persada, 2001), h. 61.

approach will investigate the understanding, aim, principles and law basic deeply.¹⁹

- b. *Statue Approach*, it aims to analyze the law through the highest regulation which is in the form of the applicable positive law regulation. That is Constitutional of Republic Indonesia 1945, legislative regulation (including Laws of regulation on Central Bank of Indonesia as the rules of its implementation in the field) and the decision of institution that has authority.
- c. *Conceptual approach*, it aims to analyze the law through juridical concept approach.²⁰

This research, the collection and the investigation of the law sources were conducted using systematically library method. That is the document investigation in its relation to justice principle, company establishment, Musharakah agreement, literature and legislative regulation that explain the mechanism of Musharakah agreement. This method was also supported by key person interview.

Sharing information and data that were collected in this research, then it would be analyzed by content analysis.²¹

RESULT AND DISCUSSION:

Justice Principle in an Agreement Based On Musharakah Agreement On Company Establishment Musharakah is a kind of agreement that it relation is formed by people who involve with the agreement which is stated by written contract (akad) in which this contract has been agreed together. At the first time before starting the agreement, sincerity among participants is needed. Besides, balance

¹⁹ Jujun S. Suriasumantri. *Filsafat Ilmu Sebagai Pengantar Populer*. (Jakarta:Sinar Harapan, 1987), h.20-21.

²⁰ Johnny Ibrahim. *Metode Penelitian Hukum Normatif*. (Malang: Bayumedia, 2006), h. 306

²¹ Valerina JL Kriekhoff. *Analisis Kontent Dalam Penelitian Hukum : Suatu Telaah Awal*, (Era Hukum No.6., 2002) h 27

situation which becomes manifestation of fair attitude. The attitude of these Sincerity and balance that will be the basic of justice implementation.

Sincerity and balance among the participants can be seen from the negotiation process at the time they start the agreement (akad). In every process of agreement negotiation, the aim or the goal of very participates is actually only focused in one point. The point is to reach agreement, to make a deal.²² According to researcher, on negotiation area, this is the process of necessity change of each participate where they can reach an agreement or a deal. Based on Roscoe Pound in Johannes Ibrahim,²³ necessity or interest is *demand or desire which human beings, either individually or through groups or associations in relations seek to satisfy*”

In the time of necessity change among participates happens, so it means that justice has been reached, although similarity cannot be sure reached. As stated by Yusuf Qardhawi,²⁴ that justice does not mean absolute similarity because equalize two different things is like differ two similar things. Those actions cannot be said as justice at all. Moreover, the absolute equality is something that is impossible. It is contradict with human nature. Furthermore, he explained that justice means equalizing two similar things based on similarity limitation and condition correspondence between those two things. In other words, differing two different things as difference limitation and connection of the condition between them.

There are only two possibilities in the end of negotiation process. The options are reaching the agreement or not reaching the agreement. If they reach a deal so the cooperation absolutely can be continued. However, if they do not reach a deal, it is clear that the business will

²² Budiono Kusumohamidjojo. *Panduan Negosiasi Kontrak*. (Jakarta: Grasindo, 1999), h. 9

²³ Johannes Ibrahim & Lindawaty Sewu. *Hukum Bisnis dalam Persepsi Manusia Modern*. (Bandung: Refika Aditama, 2003), h. 12

²⁴ Yusuf Qardhawi. *Peran Nilai Moral dalam Perekonomian Islam*. (Jakarta: Robani Press. 2001), h.396.

not be continued. As explained by Rudhi Prasetya,²⁵ in order to reach a deal it is not only the matter of good in “negotiating”, but this is the moment where the participants decide their “*bargaining position*”. One of examples of “bargaining position” implementation is the determination the amount of each capital.

Generally, Musharakah agreement is done based on the capital which is invested by each participate in the form of liquid capital. It means that Musharakah agreement only can be done if the capital is in the form of money. It cannot be done by commodity. In other words, the capital of the company establishment has to be in the form of monetary (money). They cannot use capital in the form of natura.

Based on researcher, about the form capital in company establishment. If a person wants to participate in Musharakah agreement by giving the commodity contribution, so he/she can conduct it. According to Imam Malik, it is without limitation, and its capital part is decided based on the market price at the time Musharakah agreement signed. While, according to the opinion of Imam Syafi’i, this condition can be conducted if the participant uses commodity of *dhawat al-amthal*. Based on Imam Abu Hanifah, if the participant uses commodity of *dhawat al-amthal*, it can be done by mixing the commodity of each participant into one part. However, if commodity of *dhawat al-qeemah*, so it cannot be the part of capital of Musharakah agreement. Therefore, according to researchers²⁶, the capital in company establishment can be in the form of money or commodity. If it is the capital of commodity, so the value will be determined based on market value at the time the agreement will be signed.

²⁵ Rudhi Prasetya. *Jurnal Hukum Bisnis: Analisa Hukum Ekonomi Terhadap Kontrak dalam Menyongsong Era Globalisasi*. Volume 2. 1997. h. 21

²⁶ Concerning the material of this capital, researcher agrees the opinion of Imam Malik, because his opinion is the easiest among other opinions. His opinion is logical and fulfills the need of modern business. This researcher’ opinion does not mean to underestimate other thought.

Many opinions come for Imam's idea, according researcher it indirectly implies justice for each participant who is involved in Musharakah agreement. This condition, according to Majid Khadurri is called as substantive justice²⁷, which are in the forms of justice elements in syari'ah substance (substantive justice). It is one of internal aspects of Musharakah agreement itself.

The main point of the cooperation based on Musharakah agreement is the determination of profit portion and loss portion. If the is participant feels that the determination of the profit and the loss is not fair, so eventually issue will emerge from this situation. In order to avoid those issues, so the determination of profit portion and loss portion must consider those things:²⁸

1. The determination of profit portion and loss portion of each participant must be clear and agreed from the beginning of the contract (akad). The calculation of profit portion must be based on *oncash basis method*, it means that the profit will be divided based on the real benefit that they get, not based on *accrual basis* (profit that still will be got. This is the difference between profit concept and loss sharing concept based on syari'ah economic system with conventional economy system (western).
2. Profit relationship (ratio) for each participant must be determined based on the real profit that is already got from the business, it is not determined based on their capital in that business. It is not allowed to determine participant's profit based on their capital that is invested in that company.

For determination of the loss portion, Islamic Law experts have agreed that each participant is responsible loss based on their capital portion that has been invested in that company. Thus, if participant invests 40% capital, so that participant must be responsible 40% loss,

²⁷ Majid Khadurri. *Op.Cit.*, h. 9

²⁸The discussion result with Nur Sulaiman, she is one of the observers of Syari'ah economic progress in Jakarta, 22 Juli 2010.

it cannot be less than 40% and it cannot be more than 40%. If this condition is not conducted, so Musharakah agreement is regarded illegal.

Law in Indonesia in Accommodating the Agreement based on Musharakah Agreement:

After many years the idea of business establishment based on Islamic Economic in Indonesia Economic was buried, this idea just can be applied after the existence of deregulation bank policy June 1983, 1. This regulation gives freedom to banks in deciding their interest level, even until the interest level reaches 0%. In fact, Deregulation June 1983, it did not emerge enough banks using Islamic operational. This happened because there were many regulations that prohibited the bank establishment at that time.

Until 1988, Indonesia had not accommodated Musharakah agreement. The climax was on 1998 by the publishing of Laws 1998 No.10 on the amendment of Laws 1992 No.7 on Bank system. This regulation gave opportunity to everyone in establishing syari'ah bank or even everyone who wants to convert the conventional system into syari'ah system. Laws 1998 no.10 also erased Article 6 Government Ordinance 1992 No.72 which prohibited dual system. Article 6 Laws 1998 No.10 clearly allows general bank that was using conventional system to do their activities based on syari'ah principle through:²⁹

1. The establishment of branch office or below the new branch office, or
2. Alteration of branch office or below the branch office that conduct the business conventionally becomes an office that conducts the business based on syari'ah principle.

Besides, Laws 1998 No.10 also revised some articles that are regarded important, and it is included into Laws that used Syari'ah term largely. It did not use the term of profit division anymore. On its next

²⁹ UU no. 10 Tahun 1998 tentang perubahan UU No. 7 Tahun 1992 tentang Perbankan

progress, after years the activity of syari'ah banking improves very well, and the agreement of profit division including Musharakah agreement becomes the pledge of Syari'ah Banking. Many parties realized that the activity of syari'ah banking(including Musharakah agreement) still did not have tool in solving the problems if some issues emerged among its participants. Thus, Supreme Court of Indonesia reacted soon this issue. Supreme Court established the Arrangement Team of Syari'ah Economic Law Compilation based on Decree Number: KMA / 097 / SK / X / 2006on October 2006, 20.³⁰The Arrangement Team of Syari'ah Economic Law Compilation was successful in arranging the formal law and material related to syari'ah economic law on June 2008, and Musharakah agreement was arranged clearly in BOOK II on agreement, in Chapter VI on Syirkah and Chapter VII on Syirkah Milk.

Syari'ah Economic Law Compilation that explicitly arranged Musharakah agreement, was strengthened by Laws 2008 No.21 on Syari'ah Bank which was legalized on July 2008, 16. It stated that Musharakah agreement was explicit on Article 1 (25), Article 19 Clause (1) Letter c, Article 19 Clause (2) Letter i, Article 19 (2) Letter c and i, Article 21 Letter b point 1. In the same year (2008), Directorate of Syari'ah Banking which was in Central Bank of Indonesia published product codification of Syari'ah Banking. It stated that all mechanism products of Syari'ah Economic based on Islamic Syari'ah, and Musharakah agreement was explained clearly in part II on Financing of Musharakah agreement, at point a until pint i. Product Codification of Syariah Economic which was published by Directorate of Syariah Economic in Central Bank of Indonesia gives clearer way about Musharakah agreement.³¹

In order to complete the implementation principle of Musharakah agreement in Indonesia, by do not leave Al-Quran and Hadits, the

³⁰Mahkamah Agung Republik Indonesia. *Kompilasi Hukum Ekonomi Syari'ah: Sejarah Singkat Penyusunan Kompilasi Hukum Ekonomi Syari'ah*. (Jakarta: MARI, 2008), h. x-xi

³¹ Direktorat Perbankan Syari'ah Bank Indonesia. *Kodifikasi Produk Perbankan Syari'ah*. (Jakarta: Bank Indonesia, 2008), h. B-4 – B-5.

Central Bank of Indonesia also published many regulation of Central bank Of Indonesia which became the principle and law principle in implementation of Musharakah agreement. A few of regulations from Central Bank of Indonesia which relate to Musharakah agreement are:

1. PBI No. 7/6/PBI/2005 on the transparency of bank product information and the data using of private customer and the regulation of its alteration.
2. PBI No. 7/46/PBI/2005 on collection agreement and financial distribution for Bank that conducts business activity based on Syari'ah principle.
3. PBI No. 9/19/PBI/ 2007 on the implementation of syari'h principle in the activity of financial collection and financial distribution and the service of Syariah Banking.

Basically, in the ranking of legislative order in Indonesia, the regulation from Central bank of Indonesia, is included in one of regulations, and all regulations are included into legislative regulations, because regulation from Central Bank of Indonesia is one of regulations that is ordered by economic laws, both conventional and economic law, even syari'ah economic law. It is true that Musharakah agreement has been arranged in positive law in Indonesia, as the foundation of Musharakah agreement's implementation, by adopting Islamic Law into National Law of Indonesia. Besides, Musharakah agreement can be found in positive law in Indonesia, Musharakah agreement also can be found in fatwa national Syari'ah committee (*it will be shortened as DSN on the further explanation*). Moreover, Islamic regulation (Fatwa) that controls Musharakah agreement is fatwa of National Syari'ah Committee No. 08/DSN-MUI/IV/2000 on Musharakah Financing.

Seen from the existence of Musharakah agreement in positive law in Indonesia, based on the writer, there is a pattern that can be seen. That is a gradual pattern from the highest legislative regulation until the lowest pattern based on positive law in Indonesia which this

gradual pattern is as long as the norm of Islamic law that has been stated by Syamsul Anwar. He stated that norms in Islamic Law are divided into three layers³². Those three norms are arranged as hierarchy in which the most abstract norm is realized into the concrete norm. In other words, the values of philosophy are realized into middle norm both Islamic Law Principles and Islamic law basics. Middle norms (in the form general doctrine) of Islamic Law will be realized into the form of concrete law regulations(*al-ahkam al-far'iyah*). According to the activity of mu'amalah, it is known the basic value of human justice. The basic value which is in the form of justice then will be realized in general doctrine that is *fiqhiyyah principle*. It means that “*complication gives easiness*”.³³

General doctrine is realized into the form of concrete law regulations. For example is the basic value of freedom is realized into general doctrine. That is the Islamic law in the form of justice principle and contracted freedom principle (*mabda' hurriyah at-ta'aqud*),³⁴ and the justice principle and this contracted freedom principle are realized in the form of concrete norm, example: it is allowed to make new agreement (mubah), such as Musharakah agreement and its modification, as long as it does not break the general ordinance, syar'i and Islamic attitude.

³²Syamsul Anwar. *Mazhab Yogya: Menggagas Paradigma Ushul Kontemporer*. (Tanpa Kota: Ar-Ruzz Press, 2002), h. 159. Menurut peneliti, teori ini hampir mirip dengan stufenbau theory yang dikemukakan Hans Kelsen, dimana hukum itu berjenjang, namun perbedaan antara keduanya adalah pada teori penormaam hukum Islam yang dikemukakan Syamsul Anwar nilai-nilai filosofis/dasar menjadi ruh atau nyawa dari sebuah norma hukum yang konkret sedangkan dalam stufenbau teori, nilai dasar atau asas, berada diluar tata urutan norma hukum yang berjenjang tersebut (nilai dasar/asas tidak terlihat dalam penjenjangan norma hukum menurut stufenbau teori)

³³ Penjelasan mengenai “kesukaran memberi kemudahan” ini lihat Az-Zarqa. *Syarh al Qawa'id al-Fiqhiyyah*. (Beirut: Dar al-Garbi al-Islami, 1983), h. 105 kaidah no. 16

³⁴Mengenai asas kebebasan berkontrak dalam hukum Islam, lihat Az-Zarqa'. *Al-Fiqh Al-Islami fi Tsaubihi al-Jadid*. (Damaskus: Matabi' Alifba Al-Adib, 1968). h. 466 dst

The Agreement Concept Based On Musharakah Agreement on Company Establishment

Every contract reflects the willing (*al-iradah*) of every participant in fulfilling their need. In fact, there will be many different needs that become the background of the transaction which will be conducted in the form of agreement. Before conducting the agreement arrangement, related with the willing in making agreement based on Musharakah agreement so according to researcher, there are a few things that have to be prepared:

1. Inviting all participants
2. Deciding the kind of the agreement, divided into two, those are:
 - a. Formulating the goals
 - b. Deciding the goals

Relating to Musharakah agreement, so there are some possibilities relates to the object that can be chosen by participants, those are:

1. If the object of the agreement which is invested in in the form of capital from the fund owner (*shahib al-maal*) with someone's performance (*mudharib*), thus the used agreement is *syirkah mudharabah*. In this regulation, the profit is divided based on the result of the agreement, while the loss will be endured based on the amount of their contribution.
2. If the agreement object which is invested by participants is in the form of *money/ financial assets* in the equal composition, thus the agreement that will be used is *syirkah mufawadhah*. Based on this agreement, the division of the profit and the loss which are accepted by each participant will be equal.
3. If the agreement object which is invested by participant is in the form of capital in different composition, so agreement that will be used is *syirkah inan*. In *syirkah inan* agreement, the division of the profit is based on the deal of profit partition relation. While the loss

that will be the responsible of participants depend on the amount of their capital that have been invested.

4. If the agreement object which is invested by participant is in the form of god reputation, thus he/she can get trust from the third party to manage the financial, so agreement that is used in this situation *issyirkah wujuh*.
5. If the object which is invested by participants is only in the form of action or performance in conducting something, so the agreement that is used in this situation is *syirkah abdan*.

Still relating to Musharakah agreement in company establishment, thus it is necessary to pay attention to the right formulation and responsible formulation which is realized in the form of Article³⁵

When agreement among participants happens at the time of arrangement agreement, this condition will emerge law result in which in the term of fiqh, it is called as Muqtadha al-‘Aqd. The law result in the term of fiqh is differed into two kinds, those are:³⁶

1. The result of basic law of agreement (*law of al-‘aqd al-ashli*). Relating to the agreement of musyarakah, the aim of this agreement is to establish new business (company) using sharing capital of participants that are involved in the agreement.
2. The result of addition law(*law of al-‘aqd al-tab’i*). Relating to the agreement of Musyarakah, thus right and responsible are the right and the responsible that will be got by participants as the deal that has been made.

³⁵ Hak menurut pengertian bahasa adalah: "*kekuasaan yang benar atas sesuatu atau untuk menuntut sesuatu*" arti lainnya adalah "*wewenang menurut hukum*". Lihat M. Ali Hasan. *Berbagai Macam Transaksi dalam Islam (Fiqh Muamalat)*. (Jakarta: Rajagrafindo Persada, 2003), h. 3. Kata kewajiban berasal dari kata "wajib" yang diberi imbuhan ke-an. Pengertian bahasa kata wajib berarti: (sesuatu) harus dilakukan, tidak boleh tidak dilaksanakan. Lihat Departemen Pendidikan Nasional. *Op. Cit.*, h. 1266

³⁶ Syamsul Anwar. *Op. Cit.* h. 310-311

In the formulation of article arrangement in the agreement based on Islamic Law, it generally can be divided into two kinds, those are:³⁷

1. The formulation of legal articles relating directly to the condition of syara' (*law of at-tasyri'*).

Including in this category are articles which apply the conditions of the agreement (akad) into the formulation of contract material. If an article has fulfill the condition of the agreement, thus those articles will bind, therefore the participants involve to conduct the responsible of creating performance that emerges from related agreement. In order to apply the condition of syara' into the form of articles, thus to achieve this interpretation is needed. Interpretation is from the word "interpret" which is in ethology means "explaining or investigating". It means it explains or investigates the Islamic law into applicable regulation and its characteristic is binding.³⁸

2. The formulation of articles that relates to the procedural regulation. In the process of contract formulation, the procedural article on the stipulation of agreement result that explain the way to conduct an agreement. It has to be understood that the stipulation of that regulates the technical aspect must not be contradict with the principle of syara'. Because Islam does not know that the aim of the principle can legalize all of ways (*al-ghayah tubarrir al-wasilah*). This determination points to Rasulullah SAW:

"Moslems are binded to the conditions that they have been agreed, except the condition that forbids the legal condition or legalizes the prohibited condition." (HR. Tirmidzi, Thabrani dan Baihaqi)

"Moslems are bonded with the conditions that have been agreed as long as the agreement is still in the right term." (HR. Bukhari)

Based on the perspective of business world and based on the idea of Paul H. Rubin, there are three important things that relates with the

³⁷ Syamsul Anwar. *Op. Cit.* h.305

³⁸ Ali Hasan Al-'Aridl. *Sejarah dan Metodologi Tafsir*. (Jakarta: Rajawali Press, 1994), h. 30

contract concept of Musharakah agreement as the researcher explained. *Firstly*, the contract of Musharakah agreement has a goal to ease the business doer, especially the business doer that will run business by using Musharakah agreement. The contract of Musharakah agreement is made as the need of the business (*crucial for market*), both it is admitted or is not admitted, today there are many business activities that use the concept of Musharakah agreement. However they do not realize that they use the concept of Musharakah agreement.

Secondly, the contract concept of Musharakah agreement as has been explained by researcher, still hold the efficiency concept, where the efficiency that is offered by the researcher can be seen from its way in solve the issue. Researcher offers the concept in solving the issue by kinship principle and discussion in order to reach solution. If this way is not successful, the next step is by “leading” the third party by arbitrage concept, as the alternative choice in solving the problem. If this way is still not successful, so the problem has to be brought into religion court. This efficiency concept can be seen from its first, thus it is not necessary to spend more expense to solve the problem. Litigation way becomes the last alternative in solving the problem.

Third, consistency holds the concept that minimize the occurrence of wanprestasi (performance). In the contract concept of Musharakah agreement in which researcher has offered the solution to minimize the occurrence of wanprestasi (wanperformance) can be seen from clause of right and responsibility of syariik, the statement and the guarantee of syariik management, and also the supervision and examination on fund management that becomes capital in running the business. The limitations in every clause is a form of effort in order to prevent the occurrence of wanprestasi (wanperformance) related to the implementation of Musharakah agreement.

Conclusion:

1. The principle of justice in Musharakah agreement can be found in the capital character in Musharakah agreement. The determination

of profit portion and loss portion in Musharakah agreement. It also can be found in management and the ending of cooperation with Musharakah agreement. If the condition where the deal has been reached among the participants, it means that justice has been reached, too.

2. Until now, Musharakah agreement has been accommodated in legislative regulation, from the highest regulation to the lowest regulation. Both explicitly and implicitly that legislative regulation has contained the Islamic Values that has to be applicable in doing cooperation in establishing business.
3. In formulation of articles arrangement in an agreement based on Islamic Law, generally it can be divided into two kinds: *firstly*, formulation of law articles that are directly related to syara' determination (*law of at-tasyri'*). Including in this category is the articles which apply the condition of agreement (akad) in the formulation of contract material. *Secondly*, formulation of articles related to procedural regulation, arrangement of the contract, procedural article on determination of agreement result that explains the way to run an agreement (akad).

Suggestion:

Based on the research result, there are some advice that can be purposed. Those are:

1. In the field of policy, to DPR RI, as the effort in improving business activity based on justice, thus it is necessary to make some regulations in the field of business interest that accommodates Musharakah agreement independently, remembering until now there is no legal protection from positive law in Indonesia which regulates Musharakah agreement, for the whole this time Musharakah agreement still depends on the protection of positive law in economic regulation.
2. In the academic area, this research result still need to be improved by the law research, in which analyzes company interest that uses

syari'ah concept specifically. And eventually, it creates synergy building design by using the result of this research.

3. In practical rank, government needs to socialize the Musharakah agreement that can be used by business doer in establishing company. The role of BASYARNAS needs to be improved as the alternative institution in solving the problem in the area of syari'ah economic, where the committee of National Syari'ah is given "space" to move in monitoring all disagreement related to syari'ah economic.

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